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FEDERAL COMMUNICATIONS COMMISSION
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Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
1998 Biennial Regulatory Review – Reform of the International Settlements Policy and Associated Filing Requirements	)	IB Docket No. 98-148
	)	
Regulation of International Accounting Rates	)	CC Docket No. 90-337

COMMENTS

BT North America Inc. ("BTNA"),[1] by its attorneys, hereby submits its Comments in response to the Notice of Proposed Rulemaking[2] concerning the Commission's proposed revision of its International Settlements Policy ("ISP") and associated filing requirements.

I. Introduction and Summary

The Commission's proposal to exempt U.S. carriers from the ISP and related filing requirements under certain circumstances is an important initiative that BTNA completely supports. BTNA agrees with the Commission that the global telecommunications marketplace has changed dramatically in the past decade and that the Commission needs to update the ISP to reflect current

[1] BTNA is a common carrier authorized by the Commission to provide international switched and private line services (including international simple resale or "ISR") via resale. *See, e.g., BT North America Inc.*, 13 FCC Rcd 9538 (1998); *BT North America Inc.*, 10 FCC Rcd 4414 (1995); *BT North America Inc.*, 10 FCC Rcd 3204 (1995); and *BT North America Inc.*, 9 FCC Rcd 6851 (1994). It is currently regulated as a non-dominant carrier in its provision of service on all routes except US-UK. As such, BTNA has a vital interest in the issues addressed by the NPRM.

[2] *1998 Biennial Regulatory Review – Reform of the International Settlements Policy and Associated Filing Requirements and Regulation of International Accounting Rates*, IB Docket No. 98-148, CC Docket No. 90-337, Notice of Proposed Rulemaking, (released August 6, 1998), FCC 98-148 ("NPRM").

market realities. Under the current market conditions that the Commission has identified in the NPRM, the danger is not that competition will suffer in the absence of the ISP, but rather that the ISP will inhibit competition.

The Commission is correct in its tentative conclusion that the ISP and related filing requirements should not be applied to arrangements with foreign carriers that lack market power in WTO Member countries, nor to arrangements on routes where ISR has been authorized. For the same policy reasons, BTNA also submits that the Commission should amend its *Benchmark Order* to allow U.S. carriers affiliated with non-dominant foreign carriers in WTO Member countries to operate facilities on country-routes for which the benchmark settlement rate is not satisfied. BTNA also supports the Commission's tentative conclusion that the No Special Concessions rule does not apply to the terms and conditions under which traffic is settled -- including allocation of return traffic -- by a U.S. carrier on an ISR route.

As explained below, adoption of these steps would result in significant consumer benefits. By removing unnecessary regulations that inhibit innovative competition and discourage market entry, the Commission would encourage further development of competition in the telecommunications marketplace.

II. The ISP Should Not Be Applied To Arrangements Between U.S. Carriers And Foreign Carriers That Lack Market Power In WTO Member Countries.

BTNA fully supports the Commission's proposal to eliminate the ISP requirements for arrangements concluded with foreign carriers from WTO

Member countries that lack market power on the relevant route.[3] Carriers that lack market power do not have the ability to whipsaw or otherwise to discriminate against U.S. carriers.[4] Because the ISP was implemented principally to prevent whipsawing by dominant carriers,[5] the ISP serves little, if any, public interest purpose with respect to carriers that lack market power.

The most effective long-term way to prevent foreign carriers that have market power from whipsawing U.S. carriers is to foster true competition in foreign markets. By eliminating the ISP requirements for arrangements between U.S. carriers and foreign carriers that lack market power, the Commission would encourage U.S. carriers to engage in business with non-dominant carriers in foreign markets. As U.S. carriers work with non-dominant carriers in foreign markets, the carriers' network and financial capabilities will be strengthened, thus ensuring that U.S. carriers have realistic alternatives to the dominant carriers in such markets. Where U.S. carriers are able to choose between competitive alternative carriers in foreign markets, dominant foreign carriers cannot exercise

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[3] NPRM at ¶20. Several important FCC policies and decisions have focused on whether a carrier possesses market power. *See, e.g., Access Charge Reform, Price Cap Performance Review for Local Exchange Carriers; Transport Rate Structure and Pricing; End User Common Line Charges*, 12 FCC Rcd 15982 (1997); *Motion of AT&T Corp to be Reclassified as a Non-Dominant Carrier,* Order, 11 FCC Rcd 3271 (1996); *Motion of AT&T Corp. to be Declared Non-Dominant for International Service*, Order, 11 FCC Rcd 17963 (1996); *Policy Statement on International Accounting Rate Reform*, 11 FCC Rcd 3146 (1996).

[4] The Commission has consistently recognized that whipsawing could only be accomplished by carriers that have market power. *See, e.g., Regulation of International Accounting Rates*, Fourth Report and Order, 11 FCC Rcd 20063, n.69 (1996) ("As we stated in the Foreign Carrier Entry Order, foreign entities without market power in a foreign market generally are not a source of regulatory concern."); *AT&T Corp. Proposed Extension of Accounting Rate Agreement for Switched Voice Service with Argentina*, Order, 11 FCC Rcd 18014, 18016 (1996); *Market Entry and Regulation of Foreign-Affiliated Entities*, Report and Order, 11 FCC Rcd 3873, 3879 (1995).

[5] NPRM at ¶18; *See, e.g., International Settlements Policy, Order on Recon.*, 2 FCC Rcd 1118, ¶ 2 (1987).

their theoretical ability to whipsaw U.S. carriers.

As the Commission has rightly noted, the ISP actually may inhibit competition and deter further market entry on routes that already are competitive.[6] Where restricted by the ISP, U.S. carriers do not have the freedom to enter into innovative arrangements that would better serve the market and lower the prices that U.S. consumers pay for international services. Accordingly, BTNA supports the Commission's tentative conclusion that the long-term benefits of removing the ISP for arrangements with foreign carriers that lack market power in WTO-member countries will outweigh any potential short-term risks that may be involved.[7]

III. The Commission Should Allow U.S. Carriers to Provide Facilities-Based Services with Non-Dominant Affiliates in WTO Member Countries on Non-Benchmark Routes.

For the same reasons that the Commission has proposed to eliminate the ISP requirements for arrangements between U.S. carriers and foreign carriers that lack market power, the Commission also should liberalize its benchmark policy as it is applied to U.S. carriers with non-dominant affiliates. In the *Benchmark Order*, the Commission conditioned authorizations to provide facilities-based services from the U.S. to a country in which the U.S. carrier has an affiliate on the affiliated foreign carrier offering U.S. carriers a settlement rate at or below the relevant benchmark rate.[8] This rule has a distorting effect on the

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6 *See* NPRM at ¶20.

7 NPRM at ¶20.

8 *International Settlement Rates*, 12 FCC Rcd 19,806, IB Docket No. 96-261, FCC 97-280, at ¶¶ 191-267 (rel. Aug. 18, 1997) ("Benchmark Order").

market for international services by making it difficult for new carriers to enter the market.

As a consequence of an unnecessarily broad application of this condition, even non-dominant carriers are prevented from commencing facilities-based services on the route unless they agree to employ a benchmark accounting rate. Although the Commission's purpose to reduce accounting rates is commendable, applying the condition in these circumstances effectively restricts non-dominant carriers in foreign markets from competing in the facilities-based business with dominant operators. The Commission's policies should promote, not restrict, the growth of this new competition. That competition will create the opportunity for downward pressure on accounting rates to develop. As the condition currently is applied, it plays into the hands of dominant carriers which may benefit from maintenance of the status quo.

The Commission adopted this benchmark condition "in order to restrain the ability of foreign-affiliated carriers to engage in anti-competitive price squeeze behavior in the U.S. market."[9] In order to engage in price squeeze behavior, a foreign carrier would need to set "high" international settlement rates and its U.S. affiliate would need to offer "low" prices for domestic IMTS services. However, non-dominant foreign carriers infrequently have control over the international settlement rate they offer: dominant foreign carriers typically establish international settlement rates. It is not surprising, therefore, that few – if any – non-dominant foreign carriers would be willing to invest in the U.S. end to

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[9] *Id.*

the degree necessary to engage in price squeeze behavior on the hopes that the dominant carrier will not lower the international settlement rate before the non-dominant carrier can recover the cost of its investment. Given these real market conditions, any theoretical risk from a non-dominant foreign carrier engaging in a price squeeze is far outweighed by the benefits to be gained from the growth of competition in both the foreign market and the U.S.

Similar to the prevention of whipsawing, the most effective means for preventing price squeezes is to foster true competition in foreign markets. Robust competition places downward pressure on settlement rates, which reduces the ability and incentives for foreign carriers to engage in price squeeze behavior, as the Commission has repeatedly recognized.[10] The most effective way to foster true competition is to encourage non-dominant carriers to engage in facilities-based competition against the dominant carrier, particularly because non-dominant carriers do not have the same incentives to engage in price squeeze behavior as dominant carriers. As these new entrants achieve a measure of success in the facilities-based field, they will be better positioned to undermine what is today the dominant carriers' undue influence on the setting of accounting rates.[11] For these reasons, the Commission should modify its benchmark condition with respect to non-dominant affiliates in WTO countries.

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[10] *See Benchmark Order* at ¶211.

[11] This proceeding is not the place to address the benchmark policy as a whole. However, it is important to note here that the policy, together with the Commission's stay of the application of the policy to carriers operating prior to January 1, 1998 – which are primarily U.S.-owned – may be seen as violating the letter and spirit of the Most Favored Nation and National Treatment requirements of the WTO GATS. Removing the condition with respect to carriers – many of which are foreign-owned – that seek to operate on routes where they have non-dominant affiliates, would not only serve the Commission's policy goals of fostering competition, but it would also help to address the perception of inconsistency with WTO principles.

IV. The ISP Should Not Be Applied to Arrangements Between U.S. Carriers And Foreign Carriers In WTO Member Countries to Which The FCC Has Authorized ISR.

BTNA urges the Commission to adopt its tentative conclusion that the ISP and related filing requirements should not apply to any settlement or termination arrangements on routes where ISR has been authorized.[12] The most fundamental reason for eliminating the ISP on routes where ISR has been approved is that U.S. carriers are permitted to bypass the ISP by carrying most, if not all, of their switched traffic over private lines, as the NPRM correctly recognizes.[13] On such routes, it is superfluous to retain the ISP.

Apart from the hollow effect of the ISP on routes where ISR has been authorized, whipsawing should not be a practical concern on routes that meet either of the two prongs under the Commission's ISR test. Under the ISR rules, U.S. carriers may serve routes via ISR where the destination country has been found by the Commission to offer equivalent resale opportunities, or where 50 percent of the traffic on the route is settled at or below benchmark rates.[14]

Where the Commission has found that the destination country offers equivalent resale opportunities, competition – or at least the real potential for competition – already exists. There is little benefit to maintaining the ISP on routes where competition is taking hold, because U.S. carriers are likely to have multiple available alternatives to terminate international traffic.[15] Rather, as

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[12] NPRM at ¶27.

[13] NPRM at ¶27

[14] *See* 47 C.F.R. § 63.18(e)(4).

[15] NPRM at ¶ 26.

explained above, encouraging competition through innovative agreements is the best means for eliminating whipsawing.

Where the Commission has found that 50 percent of the traffic on the route is settled at or below benchmark rates, there is very little realistic chance that a carrier with market power would whipsaw U.S. carriers. BTNA is not aware of any country that meets the relevant benchmark rate where competition does not exist. Under such circumstances, removing the ISP would have a significant pro-competitive effect on the U.S. international service market.[16]

V. Filing Requirements Should Be Eliminated Where The ISP Is Eliminated.

BTNA agrees with the Commission's tentative conclusion that the Section 43.51 contract filing requirement and the Section 64.1001 accounting rate filing requirements should be amended so that contracts and accounting rate information for arrangements that are not subject to the ISP would not need to be filed with the Commission.[17] To the extent that the general ISP restrictions are lifted, the Sections 43.51 and 64.1001 requirements also should be lifted, because the pro-competitive benefits to be gained from lifting the requirements far outweigh any theoretical justification for their retention.

The pro-competitive benefits to be gained from lifting the Sections 43.51 and 64.1001 requirements are substantial. As the Commission has recognized, not only do affirmative filing requirements impose an administrative

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16 NPRM at ¶27.

17 NPRM at ¶¶21, 30.

burden that should be avoided where unnecessary,[18] but these specific filing requirements inhibit U.S. carriers from entering into innovative arrangements that would be pro-competitive and that could reduce rates for U.S. customers.[19] In addition, the Commission would not incur the administrative burden of reviewing the filings.[20]

In stark contrast, the justification for retaining the Sections 43.51 and 64.1001 requirements is insignificant considering both that the Commission would retain the right to require the filing of specific agreements and that other carriers will keep the Commission well-informed of any potential or real anti-competitive behavior. BTNA agrees with the Commission that there appears to be little reason to maintain the filing requirements. Accordingly, BTNA supports this and all measures that remove needless regulatory burdens that hinder the development of vigorous competition.

VI. The FCC Should Clarify That The No Special Concessions Rule Does Not Apply To The Terms and Conditions Under Which a US Carrier Settles Traffic On An ISR Route.

BTNA fully supports the Commission's tentative conclusion that its No Special Concessions rule does not apply to the terms and conditions under which traffic is settled, including allocation of return traffic, by a U.S. carrier on an

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18 *See, e.g., Closed Captioning and Video Description of Video Programming*, Report and Order, 13 FCC Rcd 3272, 3375 (1997); *Implementation of Section 6002(b) of the Omnibus Budget Reconciliation Act of 1993; Annual Report and Analysis of Competitive Market Conditions With Respect to Commercial Mobile Services*, 12 FCC Rcd 11266, 11275 (1997); *Joint Board on Universal Service*, Report and Order, 12 FCC Rcd 8776, 8831-32 (1997); *Regulatory Reform for LECs Subject to Rate of Return Regulation*, Order on Reconsideration, 12 FCC 2259, 2275 (1997).

19 NPRM at ¶21.

20 *See, e.g., Detariffing for Competitive Access Providers and Competitive Local Exchange Carriers*, 12 FCC Rcd 8596, 8610 (1997).

ISR route.[21] The No Special Concessions rule is not necessary on routes where ISR has been authorized, because such routes are sufficiently competitive to prevent any carrier from whipsawing U.S. carriers, as explained above. Additionally, it would be illogical to apply the No Special Concessions rule to the terms and conditions under which traffic is settled on ISR routes if the Commission eliminates the ISP requirements on such routes. Such an anomaly in the rules would restrict carriers from being able to enter into the types of creative competitive arrangements that the Commission seeks to foster.

21 NPRM at ¶41.

VII. Conclusion

For the foregoing reasons, BTNA respectfully requests that the Commission amend its rules such that the ISP and related filing requirements do not apply to arrangements between U.S. carriers and foreign carriers that lack market power in WTO Member countries, or to arrangements between U.S. carriers and foreign carriers in WTO Member countries to which the FCC has authorized ISR. BTNA also asks the Commission to clarify that the No Special Concessions rule does not apply to the terms and conditions under which a US carrier settles traffic on an ISR route. For the same policy reasons, BTNA encourages the Commission to revise its *Benchmark Order* conditions to allow US carriers affiliated with non-dominant foreign carriers in WTO Member countries to operate facilities on country-routes even if the relevant benchmark settlement rate is not satisfied.

Respectfully submitted,

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